APPENDIX A

Supreme Court of South Carolina.

Sam B. McQUEEN, Respondent,

v.

SOUTH CAROLINA COASTAL COUNCIL, n/k/a South Carolina Department of Health and

Environmental Control, Office of Ocean and Coastal Resource Management,

Petitioner.

No. 25642.

Heard March 18, 2003.

Decided April 28, 2003.

Justice MOORE:

This regulatory takings case is before us on remand from the United States Supreme Court to reconsider our previous decision[1] in light of *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001).

FACTS AND PROCEDURE

In the early 1960's, respondent McQueen purchased two non-contiguous lots located on manmade saltwater canals in the Cherry Grove section of North Myrtle Beach. He paid $2,500 in 1961 for a lot on 53rd Avenue and $1,700 in 1963 for a lot on 48th Avenue. Since then, both lots have remained unimproved. The lots surrounding McQueen's are improved and have bulkheads or retaining walls.

In 1991, McQueen filed applications with petitioner Office of Ocean and Coastal Resource Management

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[1] *McQueen v. South Carolina Coastal Council*, 340 S.C. 65, 530 S.E.2d 628 (2000).

(OCRM)[2] to build bulkheads on his lots. After an administrative delay, he reapplied in 1993 requesting permits to backfill his lots and build bulkheads. In January 1994, a hearing was held at which the following facts were put into evidence.

At the time of the hearing, the majority of both lots had reverted to tidelands or critical area saltwater wetlands. This reversion was caused by "continuous" erosion, although little change had occurred since the permits were originally sought in 1991. The 53rd Avenue lot is inundated regularly by tidal flow all the way up to the street. The 48th Avenue lot has less tidal flow but contains more critical area wetland vegetation. On both lots, only some irregular portions of high ground remain.

The proposed backfill would permanently destroy the critical area environment on these lots. Without the backfill and bulkheads, the property does not have enough high ground to be developed. Eventually tidal water will reach the roads bordering these lots which will require bulkheads to protect the public roads.

In October 1994, a final decision[3] was issued denying both permits based on OCRM's evaluation of McQueen's lots as predominantly critical area wetlands.[4] McQueen then commenced this action seeking compensation for a regulatory taking. The master-in-equity found the denial

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[2] Formerly South Carolina Coastal Council.

[3] The Coastal Zone Management Appellate Panel upheld denial of the permits.

[4] S.C.Code Ann. § 48-39-130(C) (Supp.2002) provides that "no person shall fill, remove, dredge, drain or erect any structure on or in any way alter any critical area without first obtaining a permit from the department." Under § 48-39-10(J), "critical area" includes tidelands. "Tidelands" means "all areas which are at or below mean high tide and coastal wetlands, mudflats, and similar areas that are contiguous or adjacent to coastal waters and are an integral part of the estuarine systems involved." § 48-39-10.

of the permits deprived McQueen of all economically beneficial use of the lots and awarded him $50,000 per lot as just compensation.

OCRM appealed. By a divided court, the Court of Appeals affirmed the finding of a taking because McQueen was deprived of all economically beneficial use of his property. The majority held: "The definitive issue is what rights McQueen possessed when he purchased the lots and ... the right to add a bulkhead and fill were McQueen's at the time of purchase." *McQueen v. South Carolina Coastal Council*, 329 S.C. 588, 595, 496 S.E.2d 643, 647 (Ct.App.1998). The Court of Appeals found the evidence insufficient, however, to support the amount of compensation awarded by the master and the case was remanded. OCRM then sought a writ of certiorari in this Court which was granted.

On review of the Court of Appeals' decision, we reversed. We found it was uncontested that McQueen was deprived of all economically beneficial use of his property but found he had no reasonable investment-backed expectations because of pre-existing wetlands regulations, therefore no taking had occurred. *McQueen v. South Carolina Coastal Council*, 340 S.C. 65, 530 S.E.2d 628 (2000). The United States Supreme Court then granted McQueen's petition for a writ of certiorari, summarily vacated our opinion, and remanded for further consideration in light of the recent Palazzolo decision.

Palazzolo involved a partial taking of property including wetlands. The Rhode Island Supreme Court found the landowner had not been deprived of all economically beneficial use of his property and, even if he had, the right to fill wetlands was not part of his ownership estate because regulations prohibiting such activity were enacted before he acquired title. *Palazzolo v. State*, 746 A.2d 707 (2000). On writ of certiorari, the United States Supreme Court reversed holding that pre-existing regulation was not dispositive in itself, either in

the context of determining ownership rights under background principles of state law or in determining the investment- backed expectation factor in a partial taking. *Palazzolo*, 533 U.S. at 626 & 629-30, 121 S.Ct. 2448.

ISSUE

Do background principles of South Carolina property law absolve the State from compensating McQueen?

DISCUSSION

First, we accept as uncontested that McQueen's lots retain no value and therefore a total taking has occurred.[5]

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[5] Our analysis differs depending on whether a taking is characterized as partial or total. When there has been a partial taking by government regulation, the court determines if compensation is due by applying a complex of factors referred to as the *Penn Central* factors: the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. *Palazzolo*, 533 U.S. at 617, 121 S.Ct. 2448. Where regulation compels the property owner to suffer a physical occupation or deprives the owner of all economically beneficial use of his property, however, with "certain qualifications," compensation is due. *Palazzolo*, 533 U.S. at 617, 121 S.Ct. 2448; *see also Sea Cabins on Ocean IV Homeowners' Assoc., Inc. v. City of North Myrtle Beach*, 345 S.C. 418, 548 S.E.2d 595 (2001). In these two instances, the owner must be compensated "without case-specific inquiry into the public interest advanced in support of the restraint," a factor in the *Penn Central* complex. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

Lucas left much confusion, however, about whether another *Penn Central* factor, "investment-backed expectations," survived in the context of a total deprivation case. *Compare Good v. United States*, 189 F.3d 1355 (Fed.Cir.1999) (this factor applies even in total deprivation case) *and Palm Beach Isles Assocs.*, 231 F.3d 1354 (Fed.Cir.2000) (*Lucas* eliminated this factor in total deprivation case), *petition for rehearing en banc denied* 231 F.3d 1365 (Gajarsa, J. dissenting); *see also Westside Quik Shop, Inc. v. Stewart*, 341 S.C. 297, 534 S.E.2d 270 (2000) (following *Good*). *Palazzolo* has not clearly resolved this issue. In light of our disposition on the threshold issue of

When there has been a total deprivation of all economically beneficial use, the threshold issue in determining whether compensation is due is whether the landholder's rights of ownership are "confined by limitations on the use of land which 'inhere in the title itself.' " *Palazzolo*, 533 U.S. at 629, 121 S.Ct. 2448 (*quoting Lucas*, 505 U.S. at 1029, 112 S.Ct. 2886); *see also Rick's Amusement, Inc. v. State*, 351 S.C. 352, 570 S.E.2d 155 (2001) *cert. denied* 535 U.S. 1053, 122 S.Ct. 1909, 152 L.Ed.2d 819 (2002) (threshold inquiry in regulatory taking is whether the property interest affected is inherent in the plaintiff's ownership rights). Background principles of State property and nuisance law inform this inquiry. *Palazzolo*, 533 U.S. at 629, 121 S.Ct. 2448. Where the proscribed use is not part of the owner's title to begin with, no compensatory taking has occurred. *Lucas*, 505 U.S. at 1027, 112 S.Ct. 2886.

Public Trust Doctrine

As a coastal state, South Carolina has a long line of cases regarding the public trust doctrine in the context of land bordering navigable waters. Historically, the State holds presumptive title to land below the high water mark. As stated by this Court in 1884, not only does the State hold title to this land in *jus privatum*, it holds it in *jus publicum*, in trust for the benefit of all the citizens of this State. *State v. Pacific Guano Co.*, 22 S.C. 50, 84 (1884); *see also State v. Hardee*, 259 S.C. 535, 193 S.E.2d 497 (1972); *Rice Hope Plantation v. South Carolina Pub. Serv. Auth.*, 216 S.C. 500, 59 S.E.2d 132 (1950), *overruled on other grounds, McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985).[6]

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background principles of state law discussed below, we need not decide whether this factor applies to a total taking.

[6] The State's presumptive title may be overcome only by showing a specific grant from the sovereign which is strictly construed against

The State has the exclusive right to control land below the high water mark for the public benefit, *Port Royal Mining Co. v. Hagood*, 30 S.C. 519, 9 S.E. 686 (1889), and cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access. *Sierra Club v. Kiawah Resort Assocs.*, 318 S.C. 119, 456 S.E.2d 397 (1995); *see also Heyward v. Farmers' Min. Co.*, 42 S.C. 138, 19 S.E. 963 (1884) (public trust land cannot be placed entirely beyond direction and control of the State); *Cape Romain Land & Improvement Co. v. Georgia- Carolina Canning Co.*, 148 S.C. 428, 146 S.E. 434 (1928) (protected public purposes of trust include navigation and fishery). The State's presumptive title applies to tidelands. *State v. Yelsen Land Co.*, 265 S.C. 78, 216 S.E.2d 876 (1975).

Significantly, under South Carolina law, wetlands created by the encroachment of navigable tidal water belong to the State. *Coburg Dairy, Inc. v. Lesser*, 318 S.C. 510, 458 S.E.2d 547 (1995). Proof that land was highland at the time of grant and tidelands were subsequently created by the rising of tidal water cannot defeat the State's presumptive title to tidelands. *State v. Fain*, 273 S.C. 748, 259 S.E.2d 606 (1979).

As described above, each of McQueen's lots borders a man-made tidal canal.[7] At the time the permits were

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the grantee. *Hobonny Club, Inc. v. McEachern*, 272 S.C. 392, 252 S.E.2d 133 (1979). *Cf. City of Folly Beach v. Atlantic House Props.*, Ltd., 318 S.C. 450, 458 S.E.2d 426 (1995) (without considering public trust, compensation was ordered where it was uncontested plaintiff was "owner of record" of land below high water mark).

[7] While many of the cases cited above refer to land bordering "navigable tidal" water, under South Carolina law tidal water is presumed navigable unless shown incapable of navigation *in fact*, a showing not made here. *State v. Pacific Guano Co., supra.* The fact that a waterway is artificial is irrelevant since it is considered the functional equivalent of a natural waterway. *Hughes v. Nelson*, 303 S.C. 102, 399 S.E.2d 24 (1990).

denied,[8] the lots had reverted to tidelands with only irregular portions of highland remaining. This reversion to tidelands effected a restriction on McQueen's property rights inherent in the ownership of property bordering tidal water.

The tidelands included on McQueen's lots are public trust property subject to control of the State. McQueen's ownership rights do not include the right to backfill or place bulkheads on public trust land and the State need not compensate him for the denial of permits to do what he cannot otherwise do. *Accord Esplanade Props., Inc. v. City of Seattle*, 307 F.3d 978 (9th Cir.2002) (finding no taking where state public trust doctrine precludes dredging and filling tidelands). Any taking McQueen suffered is not a taking effected by State regulation but by the forces of nature and McQueen's own lack of vigilance in protecting his property.

We find no compensation is due. After reconsideration in light of *Palazzolo*, we reach the same conclusion we originally reached in this case and reverse the Court of Appeals.

REVERSED.

TOAL, C.J., WALLER, BURNETT and PLEICONES, JJ., concur.

580 S.E.2d 116

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[8] The value of the interest in land is to be determined at the time of condemnation. City of Folly Beach v. Atlantic House Props., Ltd., 318 S.C. 450, 458 S.E.2d 426 (1995). Condemnation occurred when the permits were denied by a final decision. *See* Palazzolo, 533 U.S. at 618. Regulatory delay does not give rise to a compensatory taking. Sea Cabins, supra.

APPENDIX B

Supreme Court of the United States

Sam B. McQueen, petitioner,

v.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT.

No. 00-285.

June 29, 2001

Case below, 340 S.C. 65, 530 S.E.2d 628.

On petition for writ of certiorari to the Supreme Court of South Carolina. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the Supreme Court of South Carolina for further consideration in light of *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d. 592 (2001).

APPENDIX C

Supreme Court of South Carolina.

Sam B. McQUEEN, Respondent,

v.

SOUTH CAROLINA COASTAL COUNCIL, n/k/a South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management,
Petitioner.

No. 25108.

Heard Feb. 3, 2000.

Decided April 17, 2000.

Rehearing Denied May 24, 2000.

BURNETT, Justice:

Petitioner South Carolina Coastal Council[1] appeals the decision of the Court of Appeals holding Coastal Council's denial of permits to bulkhead and fill lots owned by respondent constituted a taking requiring just compensation. *McQueen v. South Carolina Coastal Council,* 329 S.C. 588, 496 S.E.2d 643 (Ct.App.1998). We reverse.

FACTS

Respondent purchased a lot on 53rd Avenue in the Cherry Grove section of North Myrtle Beach in 1961 for $2500, and a lot on 48th Avenue in 1963 for $1700. Each lot is valued at $22,800 for tax purposes. Both lots are

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[1] The South Carolina Coastal Council is now known as the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management. We refer to the agency as the Coastal Council for the sake of consistency with the earlier proceedings in this case.

located on manmade, saltwater canals and were created by fill, as were all the lots in the area. Respondent's lots are unimproved, but most of his neighbors' lots have houses and bulkheads constructed on them.

In July 1991, respondent applied to the South Carolina Coastal Council for permits to build bulkheads on his lots to prevent further erosion of his own and his neighbors' property. In January 1992, the Coastal Council issued a permit for the 53rd Avenue lot only, with the condition the bulkhead be constructed 75 feet from the street. Respondent sought a 90-foot setback to comply with the City of North Myrtle Beach's requirements to build on the property. Due to some confusion on the part of the Army Corps of Engineers, which participates in the permitting process, no action was taken on the 48th Avenue lot. The Coastal Council determined the only way to correct the confusion would be to resubmit both applications and begin the review process anew.

Respondent resubmitted the applications to the Coastal Council in 1993. Both permits were denied because the proposed bulkheads were located within the tidelands critical area, so that any backfill would result in filling of tidal wetlands, adversely affecting the environment.

Respondent appealed the denial of the permits, first to the Coastal Council, then to the Coastal Zone Management Appellate Panel. Both bodies upheld the denial of the permits. The Panel found the permits sought by respondent were prohibited by S.C.Code Ann.Regs. 30-12(G)(2)(a) (Supp.1998), which provides that the creation of residential lots for private gain is not justification for filling in wetlands and that permit applications for this purpose should be denied. The Panel further found denial of the permits did not constitute a taking because respondent had no distinct investment-backed expectations, as evidenced by his failure to take action to prevent the erosion of his property.

Respondent appealed the Panel's decision to the circuit court, arguing the permit denials constituted a taking without just compensation. The case was referred to the master-in-equity, who found that by denying respondent the permits, the Coastal Council deprived him of all economically beneficial use of his property, resulting in a taking. Based on respondent's testimony that he had been offered $50,000 for each of the lots, the master found respondent was entitled to $100,000 in compensation. The Coastal Council appealed. A divided Court of Appeals affirmed the master's ruling that respondent suffered a taking, but found insufficient evidence in the record to support the master's determination as to compensation. *McQueen v. South Carolina Coastal Council,* 329 S.C. 588, 496 S.E.2d 643 (Ct.App.1998). The court therefore remanded the issue of just compensation to the circuit court. We granted Coastal Council's petition for certiorari.

ISSUES

Did Coastal Council's permit denial constitute a "taking" of respondent's property?

A. Do background principles of state law bar respondent from filling his lots?

Is *Carter v. South Carolina Coastal Council* a background principle of state property law?

B. Did respondent have distinct investment-backed expectations entitling him to compensation?

DISCUSSION

The Fifth Amendment to the United States Constitution provides "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V. The government "takes" property for public use when it regulates the property in a manner

which denies the owner all economically beneficial use of his property. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). In order to recover on a regulatory takings claim, a property owner must establish:

> (1) there was a denial of economically viable use of the property as a result of the regulatory imposition;
> (2) the property owner had distinct investment-backed expectations; and
> (3) the interest taken was vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.

Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179 (Fed.Cir.1994) (restating the law of regulatory takings as defined by cases up to and including *Lucas*). The Court of Appeals held respondent suffered a "textbook regulatory taking." *McQueen,* 329 S.C. at 600, 496 S.E.2d at 650. We disagree.

It is uncontested the permit denial at issue here deprives respondent of all economically viable use of his property. The questions before this Court are whether respondent had a vested right to backfill his property and whether respondent had investment-backed expectations of developing his property.

Coastal Council contends the Court of Appeals erred in finding the instant case bears "a remarkable similitude" to *Lucas.* David Lucas purchased two coastal tracts in 1986 for $975,000, with the intent to build single- family homes on them. In 1988, the General Assembly enacted the Beachfront Management Act, S.C.Code Ann. § 48-39-250 et. seq. (Supp.1998), which had the direct effect of barring Lucas from erecting any permanent habitable structures on his property. *Lucas,* 505 U.S. at 1006-07, 112 S.Ct. 2886. The United States Supreme Court held "[w]here the State seeks to sustain regulation that deprives land of all economically

beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 1027, 112 S.Ct. 2886.

In the instant case, respondent neglected his property for thirty years, allowed the land to revert to wetlands, and now expects the State of South Carolina to pay him the going rate for high ground--a twenty-fold return on his initial investment. We agree with Coastal Council that this case is distinguishable from *Lucas*.

A. Do background principles of state law bar respondent from filling his lots?

In addressing the third prong of the regulatory takings test, the Court of Appeals majority asked: What rights did respondent possess when he purchased the lots? *McQueen*, 329 S.C. at 599, 496 S.E.2d at 649. The majority assumed, with no citation to authority, "the right to add a bulkhead and fill were [respondent's] at the time of purchase." *Id.* We do not think this is a valid assumption.[2] Nevertheless, we affirm the Court of Appeals' ruling that *Carter v. South Carolina Coastal*

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[2] Amici Curiae have argued numerous background principles of state law which could conceivably bar a property owner from backfilling wetlands. Most significant among these is the public trust doctrine. In South Carolina, the state owns the property below the high water mark of a navigable stream; this property is part of the public trust. *Sierra Club v. Kiawah Resort Assoc.*, 318 S.C. 119, 456 S.E.2d 397 (1995), *State v. Hardee*, 259 S.C. 535, 193 S.E.2d 497 (1972), *State v. Pacific Guano Co.*, 22 S.C. 50 (1884). The corollary to this principle is the rule that "lands gradually encroached upon by water cease to belong to the former riparian or littoral owner." *Horry County v. Tilghman*, 283 S.C. 475, 478, 322 S.E.2d 831, 833 (Ct.App.1984) (citing *Spigener v. Cooner*, 42 S.C.L. (8 Rich.) 301 (1855)). Because these arguments were not made to the lower courts, and because we reverse on other grounds, we decline to address the application of these principles to respondent.

Council, 281 S.C. 201, 314 S.E.2d 327 (1984) is not a background principle of state law that bars respondent from developing his land.

> Is *Carter v. South Carolina Coastal Council* a background principle of state property law?

Coastal Council asserts this case falls into the *Lucas* exception, *i.e.*, the proscribed use interests were not part of respondent's title to begin with. Coastal Council argues that *Carter v. South Carolina Coastal Council,* 281 S.C. 201, 314 S.E.2d 327 (1984), survives *Lucas* and represents a "background principle[ ] of state nuisance and property law that prohibit[s] the uses [respondent] now intends in the circumstances in which the property is presently found." *Lucas,* 505 U.S. at 1031, 112 S.Ct. 2886. We disagree.

In *Carter,* we held denial of a permit to fill 5.3 acres of wetlands was not a taking because "[a]n owner of land has no absolute and unlimited right to change the natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others." *Id.* at 205, 314 S.E.2d at 329. We concluded the permit denial there was a valid exercise of the State's police power to prevent public harm. *Id.* at 204-05, 314 S.E.2d at 329.

Carter followed the landmark decision of *Just v. Marinette County,* 56 Wis.2d 7, 201 N.W.2d 761 (1972). Commentators are divided on whether the principle stated in *Just* (there is no absolute right to change the natural character of land) is a background principle of state property law that can be used as a basis for denying wetlands takings claims after *Lucas. See, e.g.,* Hope M. Babcock, Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches, 19 Harv.Envtl.L.Rev. 1, 46 & n. 260 (1995) (*Just* is a background principle), Jan Goldman-

Carter, Protecting Wetlands and Reasonable Investment-Backed Expectations in the Wake of Lucas v. South Carolina Coastal Council, 28 Land & Water L.Rev. 425, 447 & n. 138. (1993) (same)[3]; *but see* Joseph L. Sax, Property Rights & the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council, 45 Stan.L.Rev. 1433, 1440 (1993) (arguing the *Lucas* Court " repudiat[ed] the conclusion of *Just* "), Richard Ausness, Regulatory Taking & Wetland Protection in the Post-Lucas Era, 30 Land & Water L.Rev. 349, 403-04 (1995) ("*Lucas* is inconsistent with the reasoning of *Just v. Marinette County* and other cases that concluded that property owners have no inherent right to change the "natural" character of their land.") (citing *Carter, inter alia*).

Thus, the question before us is whether the rule articulated in *Carter* is a background principle of state property law that survives *Lucas.*[4] Our opinion in the

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[3] Commentators asserting *Just* is a background principle of state law express the principle in terms of the public trust doctrine, although neither *Just* nor *Carter* uses that term. *See supra* n. 2.

[4] No other court of record has yet squarely addressed the question whether *Just* is a background principle of state law. One court suggested it is in dicta. *See City of Riviera Beach v. Shillingburg,* 659 So.2d 1174, 1183 (Fla.Dist.Ct.App.1995) (dismissing takings claim on ripeness grounds, but citing *Just* principle post-*Lucas*); *see also Zealy v. City of Waukesha,* 201 Wis. 2d 365, 548 N.W.2d 528, 534 (1996) (finding no taking on other grounds, and declining to reach issue of whether *Just* is a *Lucas* background principle, but specifically noting that "[n]othing in this opinion limits our holding in *Just* and cases following its rule"), *Good v. United States,* 39 Fed.Cl. 81, 98 & n. 30 (1997) *aff'd* 189 F.3d 1355 (1999) (noting status of *Just* line of cases as a background principle of state law is unclear). We also note that Justice Blackmun's dissent in *Lucas* cites *Just* for the proposition that the majority erred in finding a "clear and accepted 'historical compact' or 'understanding of our citizens' justifying the Court's new takings doctrine." 505 U.S. at 1059-60, 112 S.Ct. 2886 (Blackmun, J., dissenting). Blackmun's dissent suggests he believed the majority's reasoning was flawed in light of *Just* (and other sources), not that he

first *Lucas* decision suggests the fate of *Carter* on the takings issue is inextricably linked to the outcome of the *Lucas* case. *Lucas v. South Carolina Coastal Council,* 304 S.C. 376, 388, 404 S.E.2d 895, 901 (1991) (*Lucas I*), *reversed,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) ("To adopt Lucas' argument would therefore be to overrule *Carter.*"). However, the dissent in *Lucas I* did not find *Carter* controlling, and would have found a taking without overruling *Carter. Id.* at n. 4 (Harwell, J. dissenting). Moreover, the issue in *Carter* (and in this case), was not before the Court in *Lucas* because David Lucas sought to build on high ground; there was therefore no question he had that right prior to enactment of the Beachfront Management Act. *See Lucas v. South Carolina Coastal Council,* 309 S.C. 424, 424 S.E.2d 484 (1992) (*Lucas II*) (no common law basis exists by which State could restrain Lucas' desired use of his land).

We conclude *Carter* was overruled in part by the United States Supreme Court's *Lucas* decision.[5] While not specifically addressing the holding of *Just,* the United States Supreme Court repudiated the reasoning of *Just* in *Lucas:*

> [R]egulations that leave the owner of land without economically beneficial or productive options for its use--typically, as here, *by requiring land to be left substantially in its natural state* --carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

Lucas, 505 U.S. at 1018, 112 S.Ct. 2886 (emphasis added).

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thought *Just* fell into the exception carved out by the majority for background principles of state law.

[5] This conclusion does not affect the validity of *Carter* on the issue of the substantial evidence standard of review. *See* 281 S.C. at 202-04, 314 S.E.2d at 328-29.

The *Lucas* decision made clear the State "must do more than proffer ... the conclusory assertion that [the uses respondent desires] violate a common-law maxim such as *sic utere tuo ut alienum non laedas.*"[6] *Lucas,* 505 U.S. at 1031, 112 S.Ct. 2886. Furthermore, the Supreme Court explicitly rejected the State's police power justification for denying compensation. *Id.* at 1026, 112 S.Ct. 2886. We agree with the Court of Appeals that the United States Supreme Court overruled *Carter* on the takings issue in *Lucas. McQueen,* 329 S.C. at 597, 496 S.E.2d at 648.

B. Did respondent have distinct investment-backed expectations entitling him to compensation?

Coastal Council argues the Court of Appeals erred in refusing to consider its factual argument that respondent knew his lots were eroding for some time and failed to take measures to protect his property. We agree. Coastal Council was not arguing to the Court of Appeals that respondent had a legal duty to prevent the erosion of his property. Rather, this factual argument was intended to distinguish the case at bar from *Lucas* and to demonstrate a lack of investment-backed expectations. The Court of Appeals erred in failing to address this second prong of the regulatory takings test.

In order to recover on a takings claim, a property owner must establish the regulation interfered with his distinct, investment-backed expectations. *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), *Loveladies Harbor, Inc. v. United States,* 28 F.3d 1171, 1179 (Fed.Cir.1994), *Mibbs v. South Carolina Dep't of Revenue,* 337 S.C. 601, 524 S.E.2d 626 (1999). Without the requirement of investment- backed expectations, a property owner could obtain a windfall by claiming a taking in the face of new regulations, without

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[6] "Use your own property in such a manner as not to injure that of another." Black's Law Dictionary 1380 (6th ed.1990).

any real intent to develop.This issue was not discussed in *Lucas* as there was no question David Lucas had distinct investment-backed expectations. *See Loveladies Harbor,* 28 F.3d at 1178. Nor was the issue disputed in *Loveladies Harbor. Id.* at 1179. However, several recent decisions have found no taking based on the property owner's lack of investment-backed expectations.

The most recent and similar of these decisions is *Good v. United States,* 189 F.3d 1355 (Fed.Cir.1999). Good purchased wetlands property in the Florida Keys in 1973. In 1980, he hired a land planning and development firm to obtain the federal, state, and local permits required to develop the property. In March 1981, he submitted his first permit application to the Army Corps of Engineers. The Corps granted the permit in May 1983. Good then modified the permit in response to county environmental concerns. The Corps issued a modified permit in January 1984. The permits were good for five years. *Id.* at 1357.

Good was meanwhile pursuing the required state and local permits. In February 1983, the state issued a permit conditioned on Good obtaining county approval. In May 1983, Good applied for county approval. After some wrangling over the standard of review, the county granted approval in July 1984. *Id.*

Having obtained federal, state, and county permits, Good next had to obtain review by the Florida Department of Community Affairs, pursuant to the state's Environmental Land and Water Management Act, Fla.Stat.Ann. §§ 380.012 to 380.12 (West 1997). The statute provided for the Department of Community Affairs to review local land development orders in Areas of Critical State Concern. The Department could appeal objectionable orders to the Florida Land and Water Adjudicatory Commission. The Department appealed the county's approval and the Commission held the county had applied the wrong standard of review and ordered the county to re-review the project under a stricter standard.

Id. at 1358.

In the meantime, the county had adopted a new land use plan and new development regulations. Good's project would not have been allowed under the new regulations. Good sued the state alleging a taking. That suit was settled and the consent order provided for evaluation of Good's application under the old regulations. *Id.*

By this time, Good's federal permits had almost expired. The Corps denied Good's request for an extension, but did grant new permits in October 1988 allowing substantially the same development. In November, the county gave preliminary approval to Good's plan. Final approval was subject to fifteen conditions, including approval by the South Florida Water Management District. Good applied with the Water Management District and a few months later, received notification that its staff recommended denial of the application based on "the unmitigated loss of wetlands." Good withdrew his application with the Water Management District. *Id.*

In July 1990, Good submitted a new, scaled-down plan to the Corps. Between the time the Corps issued Good's 1988 permit and the time he applied for the 1990 permit, the Lower Keys marsh rabbit was listed as an endangered species. The Corps was therefore required to consult with the Fish and Wildlife Service to make sure the requested permit would not jeopardize the marsh rabbit. The Fish and Wildlife Service concluded Good's project would not jeopardize the marsh rabbit, but nonetheless recommended denial of the permit based on the plan's overall environmental impact. *Id.* at 1368-69.

Subsequently, the silver rice rat was listed as an endangered species. In December 1991, the Fish and Wildlife Service issued a new recommendation that the Corps deny Good's 1990 application because the

development threatened both the Lower Keys marsh rabbit and the silver rice rat. The Corps denied Good's 1990 permit application in March 1994 and informed Good his 1988 permit had expired. *Id.* at 1369.

Good sued the federal government alleging a taking of property without just compensation. He argued the permit requirements of the Rivers and Harbors Act, 33 U.S.C. § 403 (1994), and the Clean Water Act, 33 U.S.C § 1344 (1994), were irrelevant to his reasonable expectations at the time he purchased the property because he obtained the federal dredge-and-fill permits required by those acts three times and was only denied a permit based on the Endangered Species Act, 16 U.S.C. § 1531 et seq. (1994), which did not exist when he bought his land. The court, while acknowledging the reasonableness of Good's argument, ultimately rejected it. It noted Good purchased the property with knowledge that it might be difficult to obtain approval for his project, then waited seven years, "watching as the applicable regulations got more stringent, before taking any steps to obtain the required approval." *Id.* at 1361-62. The court stated that "[w]hile [Good's] prolonged inaction does not bar his takings claim, it reduces his ability to fairly claim surprise when his permit application was denied." *Id.* at 1363. The court concluded Good "lacked the reasonable, investment-backed expectations that are necessary to establish that a government action effects a regulatory taking." *Id.*

While *Good* is distinguishable from the instant case in various respects, the principle it articulates applies with equal force here. Respondent purchased beachfront property that has been the subject of at least some developmental regulation for over a century. *See, e.g.*, The Rivers & Harbors Act of 1899, 33 U.S.C. § 403 (1994) (requiring a permit from the Army Corps of Engineers to develop wetlands). This pre-existing permit requirement is relevant to respondent's investment-backed

expectations. *Forest Properties, Inc. v. United States*, 39 Fed.Cl. 56, 75-76 (1997). His prolonged neglect of the property and failure to seek developmental permits in the face of ever more stringent regulations demonstrate a distinct lack of investment-backed expectations.

CONCLUSION

The Court of Appeals affirmed the denial of respondent's permit applications because the land he seeks to fill is protected wetlands. The only question before this Court is whether the denial of those permits constitutes a taking of property without just compensation. Because respondent has failed to demonstrate the distinct investment-backed expectations required to find a taking, we **REVERSE**.

TOAL, A.C.J., MOORE, WALLER, JJ., and Acting Justice R. Markley Dennis, Jr., concur.

APPENDIX D

Court of Appeals of South Carolina.

Sam B. McQUEEN, Respondent,

v.

SOUTH CAROLINA COASTAL COUNCIL, n/k/a South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management,
Appellant.

No. 2779.

Heard Dec. 2, 1997.
Decided Jan. 12, 1998.

As Corrected February 12, 1998.
Rehearing Denied Mar. 19, 1998.

ANDERSON, Judge:

Sam B. McQueen applied to the South Carolina Coastal Council[1] for permits to bulkhead[2] and backfill two noncontiguous lots he owns in the Cherry Grove section of North Myrtle Beach. The Coastal Council denied the permits, and McQueen appealed to the circuit court. The matter was referred to the master-in-equity to enter a decision with finality. The master found a taking had occurred and ordered that McQueen be compensated $100,000. The Coastal Council appeals. We affirm in

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[1] The South Carolina Coastal Council is now known as the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management.

[2] A bulkhead is "a retaining wall designed to retain fill material but not to withstand wave forces on an exposed shoreline." S.C.Code Ann. § 48-39-270(1)(b) (Supp.1996).

part, reverse in part, and remand.

FACTUAL/PROCEDURAL BACKGROUND

In 1961, Sam McQueen bought a lot on 53rd Avenue in Cherry Grove. In 1963, he bought a second lot in Cherry Grove on 48th Avenue. Both lots are located on manmade, saltwater canals. The lots in these neighborhoods were created from fill. McQueen's lots are undeveloped and are surrounded by other lots which have bulkheads. Houses have been constructed on most of the surrounding lots.

In July 1991, McQueen applied to the South Carolina Coastal Council to erect bulkheads on both of his lots to prevent further erosion. In January 1992, the Coastal Council issued a permit for the 53rd Avenue lot only. Attached to the permit was a stipulation that the bulkhead be constructed 75 feet from the street. In response, McQueen sought a 90-foot setback so that he could build on the property. Although applications for both lots were submitted with filing fees for each attached, the public notice issued by the Army Corps of Engineers (which participated in the permitting process) concerned only the 53rd Avenue lot. As a result of this confusion, action was taken only on the 53rd Avenue lot.

In a letter dated April 2, 1993, the Coastal Council stated that its failure to act on the 48th Avenue lot was because the Army Corps of Engineers sent the Council a public notice which referred only to the 53rd Avenue lot. In its letter, the Council stated, "It would appear to us that the only way to correct this confusion would be to submit a new application to the Corps or have them contact the Corps and issue a corrected public notice. Once this is accomplished, we will start our review process again."

McQueen resubmitted his applications for each lot in June 1993. No other government agency with input into the matter opposed the application, and neighbors wrote

to the Coastal Council on McQueen's behalf because the erosion on his property, where there were no bulkheads, was creating erosion on their lots. The permit administrator advised McQueen in September 1993 that both permits were being denied because the proposed bulkheads were located within "the tidelands critical area, so that any backfill results in the filling of tidal wetlands." The administrator stated filling the areas would have "an adverse environmental impact" and would serve "no overriding public interest."

McQueen sought review of the staff decision by the Coastal Council. An evidentiary hearing was held on January 21, 1994 before a hearing officer appointed by the Council to make findings of fact and recommendations to the full Council. McQueen's main grounds for the appeal were that (1) erosion control was needed on the lots; (2) the lots were originally man-made, and the bulkheads and fill would only refill previously altered areas; (3) sedimentation is having adverse effects on the canals; (4) the Army Corps of Engineers had previously approved the plans; (5) when the property was originally purchased, no restrictions were in place; and (6) the denial totally devalued the lots and amounted to an unconstitutional taking. The hearing officer recommended that the denial of the 48th Avenue lot be upheld and that the 53rd Avenue denial be overturned, "subject to the issuance of a permit substantially in accordance with the 1992 permit."

The Coastal Council refused to follow the hearing officer's recommendations and denied both permits again. Upon further review, the Coastal Zone Management Appellate Panel upheld the denials of both permits. The Panel found that the permits sought by McQueen were prohibited by S.C.Code Ann.Regs. 30-12(G)(2)(a) (Supp.1996), which provides that the creation of residential lots for private gain is not justification for filling in wetlands and that permit applications for this

purpose should be denied. The Panel determined McQueen had failed to establish the denial of the permits amounted to a taking.

McQueen appealed the Panel's decision to the circuit court, arguing the permit denials constituted a taking without just compensation. Upon referral, the master-in-equity found that by denying McQueen the permits, the Coastal Council had deprived him of all economically beneficial use of the property, resulting in a taking. The master found McQueen was entitled to $50,000 in compensation for each lot, or a total of $100,000. The Coastal Council appeals.

STANDARD OF REVIEW

The circuit court may review a decision made by the Appellate Panel "de novo." S.C.Code Ann. § 48-39-180 (Supp.1996). However, "statutes undertaking to give the courts de novo review of orders of administrative bodies exercising non-judicial functions are generally construed as providing for only a limited review." *Guerard v. Whitner,* 276 S.C. 521, 522, 280 S.E.2d 539, 540 (1981) (quoting *Board of Bank Control v. Thomason,* 236 S.C. 158, 113 S.E.2d 544 (1960)). "[T]he substantial evidence standard ... is the proper standard for review of actions by the Coastal Council." *Id.* at 523-24, 280 S.E.2d at 540. This court need only find that, looking at the entire record, "evidence that 'would allow reasonable minds to reach the conclusion that the administrative agency reached.' " *Grant v. South Carolina Coastal Council,* 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995) (quoting *Carter v. South Carolina Coastal Council,* 281 S.C. 201, 314 S.E.2d 327 (1984)). The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence. *Id.*

ISSUES

I. Did the master err by basing his findings and conclusions of law on alleged irregularities committed by the Coastal Council?

II. Is there substantial evidence in the record to support the Council's decision to deny the permits?

III. Did the master err in finding that the Council's permit denials deprived McQueen of all economically beneficial use of his property, resulting in an unconstitutional taking without just compensation?

LAW/ANALYSIS

I. Delays in the Permitting Process

The Coastal Council first argues that the master erred by basing his findings and conclusions of law on alleged irregularities it found in the Coastal Council's permitting process. The Council objects to the findings because it believes they prejudice this appeal.

The master did indeed find, *inter alia,* that (1) "for some unexplained reason, the [Coastal Council] did not issue a permit for the 48th Avenue lot even though the testimony reveals that the biologist and regional permit administrator in the Myrtle Beach office of the [Coastal Council] recommended approval of the 48th Avenue permit"; (2) "as a result of lack of action, mishandling and confusion caused by the [Coastal Council], the [Council] instructed Mr. McQueen to resubmit his applications to correct the confusion"; and (3) the Coastal Council issued denial letters for both lots more than 90 days after the filing of the applications, "contrary to the mandatory [statutory] requirements ... to act upon applications within 90 days of the filing." The master noted the significance of the reapplication process was that two additional years of erosion had occurred.

The master concluded that, once the permits were denied, a taking had occurred entitling McQueen to compensation. In our view, any irregularities, sloppiness,

or undue delay on the part of the Coastal Council that the master did notice are irrelevant for purposes of this appeal as they do not affect the master's ultimate conclusion that a taking had occurred. *See McCall v. Finley,* 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct.App.1987) ("[W]hatever doesn't make any difference, doesn't matter."); *Cox v. Cox,* 290 S.C. 245, 349 S.E.2d 92 (Ct.App.1986) (appellant has burden of showing alleged error was prejudicial).

II. Sufficiency of Evidence to Support Denial of Permits

Secondly, the Coastal Council seeks affirmance that the record supports the denial of the permits on the basis that the lots were wetlands and that erecting bulkheads and adding fill to the lots would have an adverse environmental impact. We agree. This Court need only find that, looking at the entire record, there is evidence which would allow reasonable minds to reach the conclusion that the administrative agency reached. *Grant,* 319 S.C. 348, 461 S.E.2d 388; *Carter,* 281 S.C. 201, 314 S.E.2d 327.

Here, there was evidence that the critical area[3] line on the 48th Avenue lot had moved inward, a decision based on salt-tolerant vegetation found growing on the lots, *e.g., borrichia frutescens* and *spartina alterniflora,* which are indicators of a critical area. According to the Coastal Council's biologist, critical areas provide food for the marine estuarine system, create a habitat for fish and shellfish, buffer high ground, and filter sediments and pollutants. Building bulkheads and adding fill to these lots would destroy the area permanently. The biologist

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[3] "Critical areas" include coastal waters, tidelands, beaches, and beach/dune systems. S.C.Code Ann. § 48-39-10(J) (Supp.1996). "Coastal wetlands" means "those areas periodically inundated by saline waters ... and those areas that are normally characterized by the prevalence of saline water vegetation capable of growth and reproduction." S.C.Code Ann. § 48-39-10(G) (Supp.1996).

also found the majority of the 53rd Avenue lot was in a critical area. He noted the lot was regularly inundated with tidal flow. The biologist testified the 53rd Avenue lot served as a fish and shellfish habitat, and that building a bulkhead would likewise have a detrimental effect. It is plain from the record that one could find the lots were in critical areas and that the permits should be denied as a result.

III. *Lucas v. South Carolina Coastal Council:* Taking Occurs Where Government Action Deprives Landowner of All Economically Beneficial Use of Land

Finally, the Coastal Council alleges the master erred in concluding that a taking had occurred and in ordering McQueen to be compensated. We disagree.

Under the Coastal Zone Management Act, it is the state's goal "[t]o promote economic and social improvement of the citizens of this State" while "protect[ing] the sensitive and fragile areas from inappropriate development and provid[ing] adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone." S.C.Code Ann. § 48-39-30(1) (Supp.1996). Although the state may pursue this goal zealously, such alacrity may not lead to the unreasonable exercise of the state's police power which results in an uncompensated taking. The United States Supreme Court recently espoused the rationale for this limit in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), wherein the Court stated:

> Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), it was generally thought that the Takings Clause reached only a "direct appropriation" of property, *Legal Tender Cases,* 12 Wall. 457, 551, 20 L.Ed. 287 (1870), or the functional equivalent of a "practical ouster of [the

owner's] possession," *Transportation Co. v. Chicago*, 99 U.S. 635, 642, 25 L.Ed. 336 (1878). See also *Gibson v. United States*, 166 U.S. 269, 275-276, 17 S.Ct. 578, 580, 41 L.Ed. 996 (1897). Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. 260 U.S., at 414-415, 43 S.Ct., at 160. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]." *Id.*, at 415, 43 S.Ct., at 160. These considerations gave birth in that case to the oft-cited maxim that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Ibid.*

Nevertheless, our decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going "too far" for purposes of the Fifth Amendment. In 70-odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any " 'set formula' " for determining how far is too far, preferring to "engag[e] in ... essentially ad hoc, factual inquiries." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978) (quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594, 82 S.Ct. 987, 990, 8 L.Ed.2d 130 (1962)). See Epstein, Takings: Descent and Resurrection, 1987 S.Ct.Rev. 1, 4. We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the

> property owner to suffer a physical "invasion" of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation....
>
> The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. See *Agins v. City of Tiburon,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106; see also *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 834, 107 S.Ct. 3141, 3147, 97 L.Ed.2d 677 (1987); *Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 U.S. 470, 495, 107 S.Ct. 1232, 1247, 94 L.Ed.2d 472 (1987); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264, 295-296, 101 S.Ct. 2352, 2370, 69 L.Ed.2d 1 (1981). As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests *or denies an owner economically viable use of his land.*" *Agins, supra,* 447 U.S., at 260, 100 S.Ct., at 2141 (citations omitted) (emphasis added).

Id., 505 U.S. at 1014-16, 112 S.Ct. at 2892-94.

Appellant argues *Lucas* is inapposite to this case and relies heavily on *Carter v. South Carolina Coastal Council,* 281 S.C. 201, 314 S.E.2d 327, in its brief.[4] We would note, however, that the United States Supreme Court emasculated *Carter* with respect to takings in its

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[4] In *Carter,* the South Carolina Supreme Court upheld the Coastal Council's denial of a permit to fill in marshlands as a legitimate exercise of the state's police power rather than an unreasonable taking. The court stated that a landowner has no absolute right to change the "essential natural character" of the land in order to use the land for a purpose for which it was unsuited in its natural state and which injures the rights of others. *Id.* at 204, 314 S.E.2d at 329.

Lucas opinion. In dissonance to the position taken by the Coastal Council, we conclude the case at bar epitomizes a remarkable similitude to *Lucas.*

Like McQueen, Lucas was a coastal property owner. He purchased his land in 1986, two years before the passage of the Beachfront Management Act in 1988. The Act, which redrew setback lines, prohibited Lucas from building "any permanent structure (including a dwelling), save a small deck or walkway" on his property. *Lucas v. South Carolina Coastal Council,* 304 S.C. 376, 378, 404 S.E.2d 895, 896 (1991). McQueen likewise bought his property prior to the 1977 enactment of the Coastal Zone Management Act, under which he is unable to prepare his lots for building, an activity allowed when he bought the property. As the United States Supreme Court observed in *Lucas:*

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co. v. Mahon,* 260 U.S., at 413, 43 S.Ct., at 159. And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the

> possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale). See *Andrus v. Allard,* 444 U.S. 51, 66-67, 100 S.Ct. 318, 327, 62 L.Ed.2d 210 (1979) (prohibition on sale of eagle feathers). In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.
>
> Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved, *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S., at 426, 102 S.Ct., at 3171-- though we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title.

Lucas, 505 U.S. at 1027-1029, 112 S.Ct. at 2899-2900.

It is the 1977 regulations and their progeny which have deprived McQueen of the ability to develop his lots, an expectation he clearly had when he purchased the lots over 30 years ago. McQueen's lots are among the few in the immediate vicinity which do not have bulkheads; his neighbors continue to use the existing retaining devices located on their properties and permanent dwellings have been constructed on most of the surrounding lots. *See Lucas,* 505 U.S. at 1031, 112 S.Ct. at 2901 ("The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition.... So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.").

The Coastal Council again tries to distinguish this case from *Lucas* on the basis that Lucas merely wanted to build on his property, whereas McQueen wants to "alter the character" of his lots.[5] We find this distinction to be without merit. The definitive issue is what rights McQueen possessed when he purchased the lots and, just as the right to build was one of Lucas's rights, the right to add a bulkhead and fill were McQueen's at the time of purchase.

Further, the Coastal Council argues that, although he is unable to build on his lots, McQueen has not lost all economically beneficial use of his land. The Supreme Court stated the following rule in determining whether a taking has occurred:

> We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

Lucas, 505 U.S. at 1019, 112 S.Ct. at 2895.

Regrettably, the rhetorical force of the "deprivation of all economically beneficial use" rule is not imbued with precision. In any event, we avoid this difficulty in the present case since the master found the denial of the permit left each of McQueen's lots without any economically beneficial use. In our opinion, there is evidence to support the master's finding.

McQueen testified that he is unable to do anything

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[5] The Coastal Council also argues that McQueen knew his lots were eroding for some time, and that he failed to take preventative measures earlier. However, the Council cites no legal precedent for this duty, and as such, its conclusory argument will not be considered. *Solomon v. City Realty Co.,* 262 S.C. 198, 203 S.E.2d 435 (1974) (conclusory exceptions are deemed effectively abandoned on appeal).

with either lot, including park a boat on one. The only use of the land available to McQueen after the permit denials the Council could show was "[r]ecreational, aesthetic use" that the Council's own expert testified is "really probably not directly recreational." The Council employee conceded that the recreational value to McQueen is "kind of indirect," stating, "I don't think Mr. McQueen would like everybody to come out there to crab or fish on his lots." This use does not truly benefit McQueen. We hold McQueen has suffered a textbook taking.

Just Compensation

Because we uphold the master's finding that there was a taking, McQueen is entitled to compensation. McQueen testified he paid $2,500 for the lot he purchased in 1961 (the 53rd Avenue lot) and approximately $1,700 for the one he purchased in 1963 (the 48th Avenue lot). He testified he had received offers of $50,000 on each of the two lots. However, McQueen also stated the current tax assessment value for each of the two lots was $22,800. Therefore, we find there was insufficient evidence in the record to support the master's determination that McQueen was entitled to a total of $100,000 as compensation for the taking of both lots. McQueen did not directly testify as to the value of the two lots. The record contains a response by McQueen to a cross-examination query that he received *offers* on the two lots. This testimony does not comport with the rule in South Carolina that a landowner may give testimony regarding the value of his property. *Whisenant v. James Island Corp.*, 277 S.C. 10, 281 S.E.2d 794 (1981) (a property owner, familiar with his property and its value, may give his estimate as to its value, even though he is not an expert); *South Carolina State Highway Dept. v. Wilson*, 254 S.C. 360, 175 S.E.2d 391 (1970) (same).

CONCLUSION

For the foregoing reasons, we hold the Coastal Council's denial of McQueen's permit applications for the two lots deprives him of all economically beneficial use of the land and constitutes a taking for which McQueen is entitled to compensation. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798. There is insufficient evidence in the record to support the master's determination as to the amount of compensation. The issue of just compensation is remanded to the circuit court for a determination of the amount of compensation. The amount of compensation shall be determined as of the date of the taking. *United States v. Eltzroth,* 124 F.3d 632 (4th Cir.1997). Accordingly, the decision of the master is affirmed in part, reversed in part, and remanded to the circuit court.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HUFF, J., concurs.

CONNOR, J., concurs in part and dissents in part in a separate opinion.

CONNOR, J. (Concurring in part and dissenting in part.):

I agree the record contains sufficient evidence to support Coastal Council's decision to deny the permits at issue. I also concur that delays in the permitting process are irrelevant to the merits of this appeal. However, I respectfully disagree with the majority that a taking has occurred, believing the facts of this case to be clearly distinguishable from those in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). I would reverse the master on the takings issue.

We are bound by the factual findings of the Coastal Council unless no substantial evidence exists to support them. *Guerard v. Whitner,* 276 S.C. 521, 280 S.E.2d 539

(1981). Council's facts follow.

McQueen bought the 53rd Avenue lot in 1961 for $2,500 and the 48th Avenue lot in 1963 for $1,700. Each lot is valued at $22,500 for tax purposes.

Both unimproved lots are located on filled, dead-end, salt water canals. Both have "substantially reverted to wetlands" and constitute "predominantly critical area." Most, if not all, of the other lots in this area contain improvements and some type of bulkhead or retaining wall.

The 48th Avenue lot contains "borrichia, spartina patens and spartina alterniflora." It is "high marsh," which "serves the vital function of acting as a buffer and a filter from sediments and run-off." The lot provides "habitat for birds, shellfish, and fish."

The 53rd Avenue lot, which has a lower elevation, attains "greater tidal flow." It is "unvegetated, filled with brack and other decaying critical area plants," having "tidal inundation reaching from the canal to the road." The lot serves as an "integral part of the estuarine environment as marine transport areas, for larval forms of shrimp and other marine life."

Even though erosion on the lots began around 1974, as late as 1989 the condition was still "not characterized as severe." McQueen "took no action to protect his property from erosion" from the time he purchased it until he initiated these applications.[6]

The majority finds this case remarkably similar to *Lucas*. I believe these facts are quite distinguishable from those in *Lucas*.

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[6] The hearing officer, in his Findings of Fact and Recommendations, reported McQueen met a Coastal Council representative at his lots between 1982 and 1984 to discuss the options concerning his property.

Lucas paid $975,000 for two lots, intending to build residential homes. *Lucas,* 505 U.S. at 1006, 112 S.Ct. at 2888. Two years later, the state passed legislation which basically prohibited Lucas from building habitable structures on his land. *Id.* at 1007, 112 S.Ct. at 2888. The United States Supreme Court held Lucas' ability to build on his property was contained in the "bundle of rights" he acquired when he first bought the property. *Id.* at 1027, 112 S.Ct. at 2899. The Court reasoned under these facts the state had taken Lucas' property without just compensation in violation of the Fourteenth Amendment, if it sought to regulate uses which were not already prohibited by background principles of nuisance and property law. *Id.* at 1031, 112 S.Ct. at 2901.

McQueen bought his property in the early 60's. The state Legislature passed the Coastal Zone Management Act, which prohibited the filling of marsh, in 1977. Over time, nature began reclaiming McQueen's lots. McQueen did nothing. McQueen's neighbors sought and gained permits to build bulkheads or retaining walls to protect their property from erosion. McQueen did nothing. McQueen met with a representative of Coastal Council sometime between 1982 and 1984 to ascertain his alternatives. Afterwards, McQueen did nothing. The process of erosion continued, until McQueen's property basically reverted back to marshland. Still, McQueen did nothing. Finally he applied for a bulkhead and backfill permit in 1991 so that he could build on his property. Now, McQueen wants the state to compensate him because he says a state regulation has made his property economically worthless.

The majority finds "the case at bar epitomizes a remarkable similitude to *Lucas.*" It goes on to point out both Lucas and McQueen were denied the right to build on their property because regulations with certain restrictions were passed; these regulations were not in force when they first purchased their property. However,

McQueen was not prohibited from building a house. He was prohibited from backfilling marsh, which he would not have had to do at all had he been a responsible landowner.

Even though the court in *Lucas* to some extent enumerated a bright- line test for ascertaining whether a taking had occurred, it still required a limited case-by-case analysis by remanding for South Carolina to make a determination whether the prohibited action violated any principles of state nuisance *and* property law. *Lucas,* 505 U.S. at 1031, 112 S.Ct. at 2901. In remanding the *Lucas* case to the state of South Carolina, Justice Scalia, writing for the majority, explained the state had to do more than "proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest." *Id.* at 1031, 112 S.Ct. at 2901. Rather, it had to "identify background principles of nuisance *and property law* that prohibit the uses he (Lucas) now intends in the circumstances in which the property is presently found." *Lucas,* 505 U.S. at 1031, 112 S.Ct. at 2902 (emphasis added). *See also* 106 Harv.L.Rev. 163 at 272-73 (1992). ("[R]egulation that renders property valueless will be exempt from compensation only when it prohibits that which common-law nuisance principles *or other 'background principles'* have always prohibited.") (emphasis added).[7]

In *Lucas,* Justice Scalia quoted Lord Coke, who said, "[w]hat is the land but the profits thereof?" *Lucas,* 505 U.S. at 1017, 112 S.Ct. at 2894 (quoting 1 E. Coke, *Institutes,* ch. 1, § 1 (1st Am.Ed.1812)). In 1994, the Federal Circuit of the United States Court of Appeals,

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[7] In a case such as McQueen's, where a property owner does nothing, even though cognizant external forces are detrimentally affecting his property, analogies can be drawn to background principles of state property law such as adverse possession, staleness of claims, and even the statute of limitations.

interpreting *Lucas* in light of the entire history of regulatory takings, held courts must consider whether or not the property owner had distinct "investment-backed expectations" in determining whether or not a regulatory taking had occurred. *Loveladies Harbor, Inc., et al. v. United States,* 28 F.3d 1171 (Fed.Cir.1994). *See also Property Myths, Judicial Activism, And The Lucas Case,* 23 Envtl.L. 907, 916 (1993) ("In the final analysis, from a property lawyer's perspective, Lucas is a flawed decision because it assumes that property rights amount to developmental rights.").

Under a *Lucas* and *Loveladies Harbor* analysis, I do not believe the state has taken McQueen's property. McQueen sat idly by for almost thirty years, observing his land eroding as most of his neighbors applied for and received permits to build bulkheads or retaining walls to protect their property. Meanwhile, nature reclaimed McQueen's property. As the hearing officer stated in his report, "[t]his lot, by the passage of *time* and *tides* for the past 30 years, has become unbuildable." (Emphasis added).

The majority finds the fact that McQueen's neighbors have been granted permits indicates McQueen should be granted this same right. The majority cites the following language from *Lucas:* "The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition ... So does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant." *Lucas,* 505 U.S. at 1031, 112 S.Ct. at 2901. However, the omitted phrase reads as follows: "[T]hough changed circumstances or new knowledge may make what was previously permissible no longer so." *Id.* The record contains no evidence any of McQueen's neighbors asked for permits to backfill marsh, the prohibited activity here. Rather, prior to the point in time when their property would need backfill, they apparently requested and

received permits for bulkheads or retaining walls.

Moreover, Coastal Council held McQueen took no actions to protect his investment, and therefore failed to show he had "investment-backed expectations" under *Lucas* and *Loveladies Harbor*. As Council succinctly stated, McQueen's "expectations are relative to the measures he took to protect his investment."

I agree with Council. McQueen knew his lots were eroding and failed to act to protect his property. Now that the situation has become so critical, in order to build, he has had to request permission to violate state regulations prohibiting backfilling marsh, he cannot claim entitlement to compensation because the state "took" his property.

I would reverse on the takings issue.

APPENDIX E

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
SAM E. MCQUEEN, Plaintiff,	)	Case No. 94-CP-26-3154
-vs-	)	FINAL ORDER
SOUTH CAROLINA COASTAL COUNCIL, n/k/a SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT, Defendant.	)	

TRIAL JUDGE:	John L. Breeden, Jr.
DATE OF HEARING:	January 5, 1996
PLAINTIFF'S ATTORNEY:	Ronald R. Norton
DEFENDANT'S ATTORNEY:	Mary D. Shahid
COURT REPORTER:	Grace Hurley

THIS MATTER came before this Court pursuant to the summons and complaint of the Plaintiff whereby the Plaintiff sought relief from the Defendant's denial of permit applications submitted to the Defendant by Plaintiff. The Plaintiff, by these applications, sought to construct a bulkhead on two non-contiguous lots in North Myrtle Beach, South Carolina. The lots are located on man-made canals and were created by fill. The lots are

Lot 37, Block Q-1, located on 53rd Avenue, and Lot 13, Block L-1 on 48th Avenue. For ease of reference throughout this Order, the lots will be referred to as the 53rd Avenue lot and the 48th Avenue lot. The matter came before this Court on January 5, 1996, for review pursuant to §48-39-180, Code Of Laws of South Carolina. The matter was referred to this Court by the Circuit Judge to be heard with finality, with any appeal being directly to the Supreme Court. Upon hearing argument of counsel, reviewing the entire transcript from the record below, reviewing the memorandum of law and supplemental memorandum of law submitted by each party, and upon review of all exhibits, and by the findings of fact and conclusions of law as set forth below, it is the Order of this Court that the Plaintiff shall be entitled to just compensation. The denial of the Plaintiff's permits renders the lots valueless and deprives Mr. McQueen of all economically viable use of his land thereby constituting a taking of private property under the Fifth Amendment of the United States Constitution. The Defendant shall pay just compensation to the Plaintiff for a taking of said property in the sum of $50,000.00 per lot for each respective lot, for a total of $100,000.00.

FACTUAL BACKGROUND

The Plaintiff, Sam McQueen, a longtime resident of Horry County is the owner of two separate, non-contiguous lots in the Cherry Grove Section of North Myrtle Beach. Both Lots are located on man-made canals and were created by fill. Lot 37, Block Q-1, located on 53rd Avenue, was purchased in 1961 and Lot 13, Block L-1, on 48th Avenue, was purchased in 1963. Both of the lots are unimproved and Mr. McQueen has been paying taxes on the lots since their purchase.

In 1991, Mr. McQueen applied to the South Carolina Coastal Council, now the South Carolina Department of Health and Environmental Control Office of Ocean and

Coastal Resource Management (hereinafter OCRM), for two permits, one for each lot, to construct bulkheads. The primary purpose for construction as stated on the applications was for erosion control, both as to his own lots as well his neighbors. Apparently, because of the lack of bulkheads the wash from the high tides was eroding behind the neighboring bulkheads. Secondly, the bulkheads would provide Mr. McQueen with buildable lots as each lot is one of the few remaining undeveloped, unbulkheaded lots in the area.

For some yet unexplained reason, the Charleston Office of the OCRM acted on only one of the lots, Lot 37, Block Q-1, on 53rd Avenue. On January 21, 1992, a permit was issued on this lot with the special condition that the bulkhead be located 75 feet from the street. (SCCC Exhibits 1, 2). Because of the setback requirements of the city of North Myrtle Beach, Mr. McQueen requested 90 feet from the street to make the lot a more buildable lot, an obvious distance of only 15 more feet.

Again, the OCRM did not issue a written permit on Lot 13, Block L-1, on 48th Avenue, even though it is mandatory that all permit applications be acted upon within 90 days after the application is filed. §48-39-150(c), Code of Laws of South Carolina. The testimony at the evidentiary hearing, however, reveals that Mark Caldwell, biologist and regional permit administrator for the Myrtle Beach office of the OCRM, recommended approval of the 48th Avenue permit. (TR page 13, lines 2-24; page 23, lines 18-25; page 24, lines 1-2). This is confirmed by Richard Chinnis, permit coordinator for the OCRM. (TR page 66, lines 2-5). Mr. McQueen, however, never received the written permit.

As a result of the lack of action, mishandling and confusion caused by the OCRM, the OCRM, by letter dated April 2, 1993, informed Mr. McQueen's attorney that the only way to correct the confusion would be to submit reapplications. It should be noted that Mr.

McQueen first applied for a bulkhead permit in July, 1991, and now in April of 1993 he is being told to reapply. The significance of this is that two years of erosion had occurred as a result of the OCRM's inaction and/or mishandling of the application.

On June 4, 1993, Mr. McQueen, through the services of Mike Wooten, P.E., of DDC Engineers, Inc., resubmitted two permit applications to the OCRM. These applications were received by the OCRM on June 8, 1993, as shown on their date stamped letter. (See SCCC Exhibit 10G). Again, these dates are important in that they show the OCRM again failed to comply with their own mandatory regulations requiring permits to be acted on within 90 days of filing. On September 13, 1993, more than 90 days after the applications were filed, the OCRM issued denial letters for both lots.

While the OCRM denied the permits, all other agencies requiring input voiced no objection. The U.S. Army Corp of Engineers, the S.C. Department of Health and Environmental Control (of which the OCRM is now a subsidiary), the S.C. Ports Authority, the S.C. Department of Archives and History, voiced no objections. The S.C. Wildlife and Marine Resources offered no objection provided the bulkhead is placed against the existing erosioned scarp and landward of the wetland vegetation. Mr. McQueen's neighbors requested in writing the issuance of the permit. (See SCCC Exhibits 7, 8, 10H, 10I, 11, 12, 13, 14).

From the denial of the permits on September 13, 1993, the matter was submitted to the Honorable Robert J. Moran, Jr., hearing officer appointed by the OCRM, to make findings and recommendations. Mr. Moran upheld the September 13, 1993, denial of the permit for the 48th Avenue lot, but reversed the OCRM's denial of the permit on 53rd Avenue and recommended approval of the bulkhead on 53rd Avenue, subject to the special conditions placed on the lot in 1992. The OCRM refused

to follow their hearing officer's recommendations, denied both permits again, and, then, the Appellate Panel voted to uphold the denials.

It is from the denial of the permit applications that Mr. McQueen sought relief from the Circuit Court. First, Mr. McQueen sough review of the OCRM's action "de novo" pursuant to §48-39-180, Code of Laws of South Carolina. Second, if the Court determined the permit denial by the OCRM was correct, Mr. McQueen sough to have the Court determine that the OCRM's action is an unconstitutional taking under the Fifth and Fourteenth Amendments of the United States Constitution, the South Carolina Constitution, §48-39-30(c), Code of Laws of South Carolina, and §48-39-180, Code of Laws of Couth Carolina, requiring the OCRM to pay just compensation to Mr. McQueen.

LEGAL ANALYSIS

I. The Denial of Plaintiff's Permit Renders Plaintiff's Lots Valueless and Constitute a Taking of Private Property Under the Fifth and Fourteenth Amendments of the U.S. Constitution requiring the Payment of Just Compensation.

Plaintiff, Sam McQueen, is entitled to just compensation pursuant to the Fifth and Fourteenth Amendments of the U.S. Constitution as well as the South Carolina Constitution and §§48-39-30 and 48-39-180, Code of Laws of South Carolina. See *Lucas vs. South Carolina Coastal Council*, 116 L.Ed.2d 455, 112 S.Ct. 436, motion gr. US 119 L.Ed.2d 561 and rev'd US 120 L.Ed.2d 798 (June 29, 1992).

The Panel in its Final Order denies its action is a taking, relying on *Carter vs. The South Carolina Coastal Council* (Final Order page 5, paragraph 3). The Panel's reliance on *Carter*, a 1984 South Carolina Supreme Court case is misplaced and an error of law, in light of the United States Supreme Court's ruling in *Lucas*, a 1992

decision. The OCRM's erroneous reliance on *Carter* is based on the following analysis. First, the South Carolina Supreme Court cites *Carter* to uphold its decision in *Lucas* that a regulation designed to regulate the use of property where uncontrolled use would be harmful to the public interest would not necessarily constitute a taking. Chief Justice David Harwell, in his dissenting opinion in *Lucas*, recognized that there are situations where state regulation will be a taking. The U.S. Supreme Court agreed with the dissent and reversed the South Carolina Supreme Court. The Panel's decision is, therefore, based on an error of law. *Lucas* requires compensation for a regulatory taking when the taking deprives the owner of all economically beneficial use of the property.

When the owner of real property has been called upon to sacrifice all economically beneficial use of the property in the name of common good, that is, to leave his property economically idle, he has suffered a "taking" within the meaning of the Fifth Amendment. *Lucas*, *supra*, pp. 2886, 2887. It is clear from the record that the action by the OCRM constitutes a taking. The critical area defined by the biologist envelopes the entire portions of each lot. The sketches drawn by the biologist and apparently relied on by the Council support this entire taking. The testimony of the OCRM as well as that of Mr. McQueen confirm the regulation as depriving Mr. McQueen of all economically beneficial use of his land. Mr. Mark Caldwell testified that without the bulkhead the lots might have indirect recreational use and aesthetic use to the owner. (TR page 19, lines 13-25; page 20, lines 1-6). Mr. Chinnis confirmed this. (TR page 72, lines 23-25; page 73, lines 1-8). Mr. McQueen also testified that without bulkheads he could do nothing with his lots. (TR page 80, lines 1-6). No evidence was submitted by the Defendant to support the position that Mr. McQueen had any economically viable use of his lots. Clearly, the action by the OCRM in enforcing its regulation, denies Mr. McQueen of all economically beneficial use of his

property, thereby requiring just compensation. Therefore, the regulation has the effect of declaring off limits all economically productive or beneficial use of the land. When this happens, as stated in *Lucas*, "compensation must be paid to sustain it. The state may not transform private property into public property without compensation." *Lucas, supra.*

A careful analysis of *Lucas* to the facts of this case show the factual similarities to be almost identical such that the result in *Lucas* should be the result in this case on the taking issue. First, the Court in *Lucas*, required compensation unless the state can show that the owner's proscribed use was not part of the owner's title to begin with. The U.S. Supreme Court found that Lucas' proscribed use, the proposed building of a habitable structure, was clearly part of the owner's title to begin with. Certainly, in this case, Mr. McQueen's proscribed use, the building of bulkheads to control erosion and make the lot suitable for construction, was part of the owner 's title to begin with. In looking at the proscribed use, the U.S. Supreme Court put particular emphasis on the fact that Mr. Lucas purchased his lots in 1986, before the 1988 Beachfront Management Act, which deprived Lucas of his use. In this case, the testimony reveals that Mr. McQueen purchased one lot in 1961 and the other in 1963, before the 1977 Coastal Zone Management Act. Clearly, prior to and but for the Act in *Lucas*, Mr. Lucas would have been able to build his house. Clearly, prior to and but for the Act in this case, Mr. McQueen would have been allowed to build his bulkheads. The *Lucas* Court placed particular importance on the fact that before a regulation could deny compensation, the State must show the use to which the owner intends for his property would not have been allowed prior to the regulation, based on principles of nuisance and property law. "Only on this showing can the State fairly claim that ... the Act is taking nothing." *Lucas, supra*, p. 2902. Without question, the use for which Mr. McQueen now intends

would have been allowed both on principles of nuisance, or the lack thereof, and property law and would have been allowed prior to 1977. On remand, the South Carolina Supreme Court held that there was no basis under common law sufficient to restrain Lucas from the desired use of his land. *Lucas vs. South Carolina Coastal Council*, _____ SC _____, 424 S.E.2d 484 (1992). The South Carolina Supreme Court acknowledged that unless the Coastal Council could identify nuisance or property law sufficient to restrain construction, a compensable taking had occurred. The South Carolina Supreme Court's own research could not uncover any such common law principle. *Lucas, supra.*

The South Carolina Supreme Court recently revisited this aspect of the taking issue. *Grant vs. S.C. Coastal Council*, Sup. Ct. Adv. Sheets, Opinion No. 24302, (August 21, 1995). In *Grant*, the Court denied a taking requiring compensation because Grant purchased his property was critical area at the time of purchase in 1987. The Court held that Grant's right to use his property, even though physically altered by Hurricane Hugo, was not altered from use proscribed when he originally acquired title. The Court cited *Lucas* to sustain this ruling. The distinction between *Grant* and this case is obviously that when Grant purchased in 1987, critical area was regulated since 1977. However, when Mr. McQueen purchased in 1961 and 1963, critical area would not be regulated until 1977.

The Panel also cites *Loveladies Harbor, Inc.* to justify its decision. (Final Order, page 6). *Loveladies* contained a three prong test for determining if there has been a regulatory taking.

1) If there was a denial of economically viable use of the property as a result of the regulatory imposition;

2) the property owner had distinct investment-backed expectations; and

3) it was an interest vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.

The Panel, while stating that *Loveladies* is a freshwater wetlands case and refusing to concede that *Loveladies* and successive freshwater wetland cases control their disposition of the issue, proceed to argue that Mr. McQueen fails to satisfy the second prong of the test because of the measures Mr. McQueen took to protect his investment. (Final Order, page 6). This denial, then reliance on *Loveladies*, demonstrates that the Panel wants to have it both ways. In point of fact, however, as stated above, Mr. McQueen not only acted to protect his investment, but acted in a timely fashion and within the time in which the OCRM's own documents demonstrate the permits could have been issued. I do not find the Defendant's argument that the Plaintiff had no investment-backed expectations to be compelling. The testimony by Mr. McQueen indicates that his intent was to ultimately build on each lot. The fact that a period of time may have passed between purchase of the lots and a decision to seek a permit is insufficient to conclude that the property owner had no investment-backed expectations. In addition, the Defendant failed to submit any evidence to support this argument regarding the Plaintiff's failure to meet this second prong of the *Loveladies* test. Obviously, as shown above, the first, second and third prongs of the *Loveladies* test have been met.

With this analysis in mind, this Court must now seek to determine the amount of just compensation to be paid to Mr. McQueen for this taking. The record is clear on this. Mr. McQueen testified he had been offered over $50,000.00 for the lots. (TR page 82, lines 11-13). The law is clear that a property owner can offer any testimony as to the value of his property. The OCRM did not offer

testimony to contradict Mr. McQueen's values. This uncontradicted testimony establishes a value of $50,000.00 per lot for purposes of compensating Mr. McQueen for the taking.

Under the *Lucas* decision, Mr. McQueen is entitled to compensation for the regulatory taking. The factual aspects of this case parallel *Lucas*. Mr. McQueen purchased his property prior to enactment of the legislation. But for the legislation, Mr. McQueen would be entitled to his bulkheads. If the OCRM wishes to claim these lots for the public good and deprive Mr. McQueen of all economically beneficial use of his lots, OCRM must pay just compensation.

Based upon the foregoing Factual Background and Legal Analysis, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1) I find that the Plaintiff is a citizen and resident of Horry County, South Carolina, and the Defendant is a governmental agency organized under the laws of the State of South Carolina, and that the parties and the subject matter of this action are properly before this Court.

2) I find that the factual background and the legal analysis are incorporated into these findings of fact as well as the conclusions of law as if fully repeated herein.

3) I find that the Plaintiff is the owner of two non-contiguous lots in North Myrtle Beach, South Carolina. The lots are on man-made channels and were created by fill. The lots are Lot 37, Block Q-1, on 53rd Avenue, and Lot 13, L-1, on 48th Avenue. The 53rd Avenue lot was purchased in 1961 and the 48th Avenue lot was purchased in 1963.

4) I find that the Plaintiff applied to the South Carolina Coastal Council, now known as the South

Carolina Department of Health and Environmental Control Office of Ocean and Coastal Resource Management, for two permits, one for each lot, to construct bulkheads.

5) I find that the purpose for construction was for erosion control and also to insure the buildability of each lot.

6) I find that on January 21, 1992, a permit was issued for construction of a bulkhead on the 53rd Avenue lot, with certain special conditions being that the bulkhead be located 75 feet from the street.

7) I find from the testimony, for some unexplained reason, OCMR did not issue a permit for the 48th Avenue lot even though the testimony reveals that the biologist and regional permit administrator in the Myrtle Beach office of the OCRM recommended approval of the 48th Avenue permit.

8) I find that as a result of lack of action, mishandling and confusion caused by the OCRM, the OCRM instructed Mr. McQueen to resubmit his applications to correct the confusion.

9) I find that on June 4, 1993, the Plaintiff resubmitted two permit applications to the OCRM and said applications were received by the OCRM on June 8, 1993.

10) I find that on September 13, 1993, the OCRM issued denial letters for both lots. I find that these denials were issued more than 90 days after the date of the filing of the application, which is contrary to the mandatory requirements of the OCRM to act upon applications within 90 days of the filing.

11) I find that while the OCRM denied the permits, all other agencies requiring input voiced no objection to the issuance of the permit.

12) I find that from the denial of the permits, the matter was submitted to the Honorable Robert J. Moran, Jr., a hearing officer appointed by the OCRM, to make findings and recommendations. Mr. Moran upheld the denial of the permit on the 48th Avenue lot, but reversed the OCRM's denial on the 53rd Avenue lot and recommended approval, subject to the special conditions placed on the lot in 1992.

13) I find that the OCRM did not follow the hearing officer's recommendations and denied both permits again and then the appellate panel voted to uphold the denials.

14) I find that from the denial of the permit applications, the Plaintiff sought relief from this Court pursuant to statute as well as the South Carolina and United States Constitutions.

15) I find that the action of the OCRM in denying Plaintiff his permits to construct bulkheads, as well as in defining the lots as critical area, deprive Mr. McQueen of all economically beneficial use of his property and, therefore, constitutes a taking within the meaning of the United States and South Carolina Constitutions as is set forth in *Lucas vs. South Carolina Coastal Council*, 116 L.Ed. 2d 455, 112 S.Ct. 436, motion gr. U.S. 119 L.Ed.2d. 561, rev'd U.S. 120 L.Ed.2d 798 (June 29, 1992).

16) I find that as a result of the taking, and based upon the testimony, Mr. McQueen is entitled to receive the sum of $50,000.00 for each lot, for a total of $100,000.00, as just compensation.

CONCLUSIONS OF LAW

Based upon the foregoing, I make the following conclusions of law.

17) I conclude that the parties and the subject matter of this action are properly before this Court.

18) I conclude that the conclusions as set forth in the factual background, as well as the legal analysis, are

incorporated into and made a part of these conclusions of law as if fully repeated herein.

19) I conclude the action of the OCRM in defining each lot as critical area and in denying the Plaintiff the right to construct bulkheads pursuant to his applications denies the Plaintiff all economically beneficial or viable use of his property and constitutes a taking within the meaning of the United States and South Carolina Constitutions, as analyzed in *Lucas vs. South Carolina Coastal Council*, 116 L.Ed.2d 455, 112 S.Ct. 436, motion gr. U.S. 119 L.Ed.2d 561, rev'd U.S. 120 L.Ed.2d 798 (June 29, 1992).

20) I conclude that as a result of the taking as set forth above, the Plaintiff is entitled to just compensation in the sum of $50,000.00 for each lot, for a total of $100,000.00.

21) I conclude that the Defendant shall pay said sum to the Plaintiff within 30 days of the date of this Order.

It is, therefore, **ORDERED, ADJUDGED AND DECREED** that the action of the OCRM in defining each lot as critical area and in denying the Plaintiff the right to construct bulkheads pursuant to his applications denies the Plaintiff all economically beneficial or viable use of his property and constitutes a taking within the meaning of the United States and South Carolina Constitutions, as analyzed in *Lucas vs. South Carolina Coastal Council*, 116 L.Ed.2d 455, 112 S.Ct. 436, motion gr. U.S. 119 L.Ed.2d 561, rev'd U.S. 120 L.Ed.2d 798. (June 29, 1992).

And it is further **ORDERED, ADJUDGED AND DECREED** that as a result of the taking as set forth above, the Plaintiff is entitled to just compensation in the sum of $50,000.00 for each lot, for a total of $100,000.00, to be paid within 30 days of the date of this Order.

AND IT IS SO ORDERED.

s/ John L. Breeden, Jr.
John L. Breeden, Jr.
Master in Equity

Dated: Feb. 28, 1996
Conway, South Carolina

APPENDIX F

The Supreme Court of South Carolina

Sam B. McQueen, Respondent,

v.

South Carolina Costal Council, n/k/a South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management, Petitioner.

ORDER

The United States Supreme Court vacated this Courts opinion in *McQueen v. South Carolina Coastal Council*, 340 S.C. 65, 530 S.E.2d 628 (2000), and remanded it in light of *Palazzolo v. Rhode Island*, __ U.S. __, 121 S.Ct. 2448, 150 L.E.2d 592 (2001). *See McQueen v. South Carolina Dep't of Health*, __ U.S. __, 121 S.Ct. 2581, 150 L.Ed.2d 742 (2001).

Respondent filed a Motion to Amend Order with this Court on February 20, 2002. Petitioner filed a Petition to File a Late Return and a Return to Respondent's Motion on March 8, 2002. We grant Petitioner's request to file a late return. We deny Respondent's Motion to Amend by adding proposed question IV. Instead we vacate our previous Order and substitute the following.

This Court orders each party to submit briefs answering the following questions:

I. Did the Court of Appeals err in finding Coastal Council's regulation deprived McQueen of all economically valuable use of his property?

II. If not, do background principles within South Carolina property or nuisance law absolve the State from compensating McQueen?

III. If not, may a court use investment-backed expectations to determine McQueen's damages?

Petitioner must submit briefs within thirty (30) days from the issuance of this Order. Respondent must submit briefs within thirty (30) days from the date of service of Petitioner's brief. Petitioner must submit its reply brief within ten (10) days from the date of service of Respondent's brief. Briefs should comply with the requirements of Rule 208, SCACR.

s/ Hoefer Toal C.J.

s/ James E. Moore J.

s/ John H. Waller Jr. J.

s/ E.C. Burnett III. J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

March 22, 2002

APPENDIX G

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
The Honorable John L. Breeden, Jr., Master-in-Equity

Case No. 94-CP-26-3154

Sam B. McQueen, Respondent,

v.

South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (formerly known as South Carolina Coastal Council) Appellant.

PETITION TO FILE LATE RETURN AND RETURN TO MCQUEEN'S MOTION TO ADD QUESTION

The Department respectfully requests that this court allow the Department to file a late return to McQueen's Motion seeking to add a question. The Petition for filing a late Return to this Motion is based on the fact that the undersigned counsel for the Department is preparing to leave her employment with the Department, effective March 15, 2002. In the process of closing out numerous legal matters with the Department, the undersigned missed the importance of responding to this motion in a timely fashion. Accordingly, the Department seeks to file the following return:

1. The Department agrees with McQueen that, in light of the U.S. Supreme Court's decision in *Palazzolo v. Rhode Island*, __U.S. __, 121 S.Ct. 2448, 150 L.E.2d 592 (2001), it is appropriate for the court to address the threshold question of whether a lack of reasonable investment-backed expectations can, depending on the facts and circumstances of the particular case, bar a regulatory taking claim, including a categorical taking claim. Accordingly the Department agrees with McQueen that the Court's order dated January 10, 2002 should be revised to instruct the parties to address the issue.

2. However, the Department objects to the questions as proposed by Respondent. In particular, the Department objects to subpart (B) of this question because it requests the Court to revisit a factual issue and does not represent an appropriate question for the Court to address or remand from the U.S. Supreme Court's decision in *Palazzolo*. The remand should focus on whether the legal rulings in *Palazzolo* draw into question any of the court's legal analysis in its initial decision. The remand should not provide the opportunity to relitigate issues of fact.

3. The Department also questions whether question three in the Court's January 10th Order requires a separate analysis in view of the close interrelationship between that question and the threshold question of whether a lack of reasonable investment-backed expectations can bar a categorical taking claim. The Department submits that the role of the expectations factor in takings analysis will be most usefully addressed in response to a single, general question on the expectations issue.

4. Accordingly the Department proposes that the Court revise its January 10th Order to instruct the parties to address a single question on the "expectation" issue, in lieu of both existing question three and proposed question four. The Department proposes that this question should read as follows: "In light of *Palazzolo*, what is the role of

the reasonable investment-backed expectation factor in a categorical regulatory taking case?"

Respectfully submitted,

s/Mary D. Shahid
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Attorney for SC Department of
Health and Environmental Control,
Office of Ocean and Coastal
Resource Management

APPENDIX H

The Supreme Court of South Carolina

Sam B. McQueen, Respondent,

v.

South Carolina Coastal Council, n/k/a South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management, Petitioner.

MOTION TO AMEND ORDER

The Respondent, by and through his undersigned attorneys, moves the Court to amend its Order dated January 10, 2002, directing the parties to submit briefs on three issues. Respondent respectfully requests that the Court include the following question:

IV. Does the U.S. Supreme Court's decision in *Palazzolo v. Rhode Island*, 533 U.S. ___, 121 S.Ct. 2448 (2001), mean that Mr. McQueen (A) need not prove that the challenged restriction interferes with his reasonable investment-backed expectations, because he has raised a categorical takings claim, and that (B) even if relevant to a categorical takings claim, his reasonable investment-backed expectations are not extinguished by a delay in seeking development permits?

Said Motion is made upon the grounds that

A. The United States Supreme Court granted the Respondent's Petition for Writ of Certiori to the Supreme Court of South Carolina, vacated the South Carolina Supreme Court's opinion in *McQueen v.*

South Carolina Coastal Council, 340 S.C. 65, 530 S.E.2d 628 (2000), and remanded the case for reconsideration in light of *Palazzolo v. Rhode Island*, 533 U.S.____, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001).

B. That the U.S. Supreme Court's remand order indicates that it found *Palazzolo* "sufficiently analogous and, perhaps, decisive to compel re-examination of the case." *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964) (per curiam); see also *Lawrence v. Chater*, 516 U.S. 163, (1996) (explaining that an order granting certiorari, vacating the lower court decision, and remanding with instructions to reconsider that decision in light of an intervening U.S. Supreme Court precedent is appropriate when there is "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation").

C. That the Supreme Court's mandate thus calls on this Court to determine what effect *Palazzolo* had on its prior decision in this case.

D. That *Palazzolo* held that a regulatory takings claim "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." 121 U.S. at 2464.

E. That this Court previously held that Mr. McQueen had not suffered a taking, even though it was "uncontested the permit denial at issue here deprives [him] of all economically viable use of his property," *McQueen v. South Carolina Coastal Council*, 340 S.C. 65, 530 S.E.2d 628 (2000), solely because "[h]is prolonged neglect of the property and failure to seek development permits in the face of ever more

stringent regulations demonsrtate a distinct lack of investment-backed expectations." *Id.* at 76.

F. That the three questions already posed by the Court do not include the critical question that we present here.

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February 15, 2002

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APPENDIX I

The Supreme Court of South Carolina

Sam B. McQueen, Respondent,

v.

South Carolina Coastal Council, n/k/a South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management, Petitioner.

ORDER

The United States Supreme Court vacated this Courts opinion in *McQueen v. South Carolina Coastal Council*, 340 S.C. 65, 530 S.E.2d 628 (2000), and remanded it in light of *Palazzolo v. Rhode Island*, __U.S. __, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001). See *McQueen v. South Carolina Dep't of Health*, __U.S. __, 121 S.Ct. 2581, 150 L.Ed.2d 742 (2001). This Court orders the parties to submit briefs on the following issues:

I. Did the Court of Appeals err in finding Coastal Council's regulation deprived McQueen of all economically valuable use of his property?

II. Do background principles within South Carolina property or nuisance law absolve the State from compensating McQueen?

III. May a court use investment-backed expectations to determine McQueen's damages?

Petitioner must submit briefs within thirty (30) days from the issuance of this Order. Respondent must submit briefs within thirty (30) days from the date of service of Petitioner's

brief. Petitioner must submit its reply brief within ten (10) days from the date of service of Respondent's brief. Briefs should comply with the requirements of Rule 208, SCACR.

s/Hoefer Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

January 10, 2002